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IN THE

United States Supreme Court.

OCTOBER TERM, 1900.
NO. 129.

THE NEW ORLEANS DEBENTURE REDEMPTION COMPANY, OF LOUISIANA, LIMITED, Et Al., Plaintiff in Error.

VERSUS

THE STATE OF LOUISIANA, - Defendant in Error.

In Error to the Supreme Court of Louisiana.

Brief on Behalf of the State of Louisiana, Defendant in Error.

WALTER GUION,
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L. Graham & Son, Ltd. New Orleans.

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1900.

No. 129.

THE NEW ORLEANS DEBENTURE REDEMPTION COMPANY, OF LOUISIANA, LIMITED, ET AL.,
PLAINTIFF IN ERROR,

versus

THE STATE OF LOUISIANA, DEFENDANT IN ERROR.

In Error to the Supreme Court of Louisiana.

BRIEF ON BEHALF OF THE STATE OF LOUISIANA, DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

The State of Louisiana, through its Attorney General, brought this suit in the Civil District Court for the parish of Orleans against the New Orleans Debenture Redemption Company of Louisiana, Limited, for the purpose of ousting it from the exercise of a corporate franchise, putting an end to its corporate existence, and liquidating its affairs.

The gravamen of the complaint of the State is:

(1) That the purposes for which the company claims to be incorporated, as disclosed by the acts purporting to be its

charter and amended charter and the business actually conducted by the company, involves a gambling scheme, is *contra bonos mores*, against public policy, and in conflict with Art. 172 of the late, and Art. 188 of the present Constitution of the State of Louisiana.

(2) That Act 36 of 1888 of the General Assembly of Louisiana, under which said company claims to be a corporation, by the adoption of a notarial charter drawn in accordance with its provisions, and by virtue of which said company claims the right to exercise a franchise as a corporation chartered by the State of Louisiana, is **not a statutory warrant** for the incorporation of a **debenture scheme** such as is operated by the said company.

(3) That even if the objects and purposes of the company as set forth in its charter are legal and are within the purview of Act 36 of 1888, and even if the defendant company is organized for an ostensible purpose that is legal, and the charter is valid, the real business carried on under the cloak of the charter is illegal and against public policy, and hence the corporation has been **guilty of misuser.**

(4) That the said company has issued fictitious stock and thus violated the provisions of the Louisiana Constitution as contained in Article 266 of the New Constitution, and Article 238 of the Constitution of 1879, and the penalty of forfeiture therein provided should be enforced.

The prayer of the State asked for alternative relief, as follows, viz.:

(1) That the charter be declared a nullity; or,

(2) If the charter should be held to be valid, that it be forfeited for misuser.

And in all events, that the Debenture Company be ousted from exercising a corporate franchise, and be enjoined and

prohibited from acting as a corporation or carrying on business as such, and its affairs be liquidated.

A preliminary injunction was issued upon the filing of the original petition, but was set aside on motion of the Debenture Company. This preliminary injunction was reinstated by the court in a slightly modified form when the State again requested it by supplemental petition, *before, and not after, the case was argued and submitted,* as the plaintiffs in error set out in their assignment of errors Nos. 7 and 13; and was made perpetual by the judgment of the lower court only after an opportunity had been afforded counsel for the Debenture Company to be heard thereon. As it finally issued, it was no broader in its terms than requested by the State in its original petition.

After first appearing in court for the purpose of setting aside the preliminary injunction, and after filing a motion to be allowed to bond the same, the Debenture Company filed an exception (an exception corresponds to the demurrer of the Common Law), under which the following contentions were made and urged in argument:

(1) The State is not rightfully a party and is without right or interest to prosecute this suit.

(2) Each and every owner of a share of stock should have been made a party to this action and a citation should have issued to each shareholder; until that was done, no judgment could be rendered against the Debenture Company, although a regular citation had issued to it, addressed to "The New Orleans Redemption Debenture Company of Louisiana, Limited, through its proper officers," and had been served on its president as required by law.

(3) The petition disclosed no cause of action.

(4) The causes of action are inconsistent and conflicting.

The exceptions were overruled, and the Debenture Company filed an answer wherein after generally denying all the allegations of the petition, it averred that it was a duly and legally constituted private corporation, organized in conformity with the laws of the State of Louisiana and more especially Act 36 of 1888 "for the pursuit by it of the private enterprise and purpose set forth in its charter, that it was so created and constituted by an act passed before Henry L. Garland, Notary Public, on the 25th day of September, 1894, by the twenty persons, stock subscribers, by whom the said contract and agreement was made and executed, to create and constitute this defendant an active and duly organized corporation."

The answer further set forth that the business of the corporation was a lawful one, and prayed that the demand of the State be rejected.

A supplemental answer was thereafter filed which sets forth that Act 36 of 1888, is a statutory warrant for the incorporation of the Debenture business, and further:

"That the purpose of this suit is to deprive the defendant, a duly and legally organized corporation under the laws of this State, of the legal right to engage in or pursue the same in any manner; that this suit as instituted and now prosecuted is for a purpose and has for its object one which is in violation of the Constitution of this State and of the Constitution and laws of the United States, in that it deprives the defendant of its property without due process of law and denies this defendant the equal protection of the laws of the State of Louisiana and of the United States, and that said object and purpose is in contravention of the Constitution of the Sate of Louisiana and of the Constitution and Amendments thereto and the laws of the United States, in that said object and purpose is intended to deprive this defendant of

its lawful right to pursue a lawful business, calling or avocation, and said object and purpose is an unlawful discrimination against this defendant corporation and a denial to it of the equal protection of the law in the pursuit of its business."

These are the **Federal Questions** as raised by the **defendant corporation** in the lower Court. It is worthy of notice in considering the assignment of errors that it is the Corporation that makes the claim of being deprived of its property "without due process of the law," etc.

The cause was thereafter tried on the merits. All the Directors of the Debenture Company were summoned as witnesses by the State, but the testimony of a very few sufficed.

The State proved its case by overwhelming evidence. It demonstrated to the satisfaction of the trial Judge that the business of the Debenture Company was illegal, and the real purpose of its incorporation was *contra bonos mores* and against public policy. The opinion of the Supreme Court reviews the facts. It further showed that nearly all the stock issued was fictitious. This is the way it was done: After making a call of ten per cent. upon the stock subscribed for, and declaring a divident of five per cent, the Board of Directors passed a resolution calling for the payment of the balance due by the shareholders, amounting to 85 per cent. of their subscriptions.

They then, at a subsequent meeting, passed a resolution authorizing any subscriber to the stock to borrow 90 per cent. of its face value, upon giving the Company his note for the amount and pledging the certificate of stock issued to him as **full paid stock**. Most of the stockholders availed themselves of the privilege of borrowing 90 per cent. of the face value of the stock. On the same day the subscribers to stock gave their checks to the Company for 85 per cent. of their sub-

scription they received the check of the company for 90 per cent. of the face value of the stock. They executed their notes for an amount equal to 90 per cent. of the face value of the stock, and thereupon the secretary issued, in the name of the subscribers, certificates of stock as fully paid up. These certificates were pledged to the company for the security of the individual notes of the subscribers.

The most important facts and the most essential for the determination of the issues presented to this Court are those which were found by the lower court and reviewed by the Supreme Court, which relate to the validity and legality of the citation. The Court found that all the parties claiming to be stockholders of the Debenture Company (which includes all those who joined in the appeal to the State Supreme Court, and appear here as plaintiffs in error—together with the Debenture Company), had entered into a contract with each other and agreed and stipulated in said contract that they should be sued in the name of the New Orleans Debenture Redemption Company of Louisiana, Limited, in all matters pertaining to or growing out of the joint enterprise.

In said contract they further stipulated that one of their number, namely, their president, should be their agent for the purpose of receiving citation, and for the purpose of representing them in all suits and judicial proceedings.

The Court further found that citation in this case had been directed to the New Orleans Debenture Redemption Company of Louisiana, Limited, the name which the association of individuals claiming to be a corporation had selected, and that the citation had been served upon Walter H. Rogers, president of the company, who had been appointed by all of them as their agent to receive citation and to represent them in all suits and in all matters growing out of suits.

The lower court rendered judgment annulling the charter and declaring it void. It perpetuated the preliminary injunction and prohibited the Debenture Company, its officers, directors, agents or representatives from carrying on business as a corporation, and from removing its assets from the State.

The judgment was one of ouster, and was most sweeping in its terms.

(Tr., p. 389).

Thereafter, the Governor of the State of Louisiana, acting by virtue of section 731 of the Louisiana Revised Statutes, which empowers him to appoint a liquidator whenever the charter of a corporation is forfeited, appointed A. M. Benedic liquidator. Application was made to the Court for his recognition as liquidator in the above proceedings. The Court rendered an order recognizing A. M. Benedic as liquidator of the New Orleans Debenture Redemption Company of Louisiana, Limited, and authorizing him to take charge of all the assets of the company.

The Debenture Company took two appeals; one from the judgment annulling its charter and perpetuating the injunction, and one from the decree recognizing A. M. Benedic as liquidator.

First appearance of the other twenty-three plaintiffs in error.

Up to this time, the proceedings had been conducted by the State as plaintiff, and the New Orleans Debenture Redemption Company as defendant. The other twenty-three plaintiffs in error filed as their first pleading a petition for a suspensive appeal from the judgment of the lower court. They averred that they desired to intervene solely for the purpose of taking and prosecuting an appeal to the end that on said appeal they may be enabled to be heard, and "to reverse, annul and set aside all of said proceedings in said matter."

They complained that they had not been made parties to the suit in their individual names, and because none of them had been served with individual citations, and that furthermore the citation that had been served on Walter H. Rogers (one of their number), was not sufficient, because it was addressed to the "New Orleans Debenture Redemption Company of Louisiana, Limited, through its proper officers."

In this petition, however, these twenty-three stockholders do not invoke the protection of the Federal Constitution and its amendments. It is only in their **application for a rehearing** that they claim to be deprived of property without due process of law, etc.

On appeal, the cause was duly heard before the Supreme Court of Louisiana.

On June 22, 1899, the judgment of the lower court was affirmed (Tr., p. 423).

On June 29, 1899, the Court passed upon the separate appeal from the order recognizing the liquidator. The decree of the lower court was reversed and the order recognizing August M. Benedic was set aside and the matter left at large. All the rights of the parties were reserved as related to the appointment of a receiver or liquidator "to be hereafter passed upon" (Tr., p. 488).

On June 30, 1899, the Supreme Court passed upon the applications for rehearing. The opinion of the Court says "The illegality of the charter was decreed. The Court considered that as to liquidator or receiver *vel non*, contradictorily with parties in interest, the question can be considered in the District Court, to which the judgment is **remanded** for execution.

"The whole question as to the appointment of liquidator or receiver was left at large and to be considered as an original question. **Whether the appointment of liquidator lies**

with the Governor, or of a receiver with the Court, or the parties in interest, we do not determine. It is left an open question. Rehearings refused (Tr., p. 430).

The New Orleans Debenture Redemption Company of Louisiana, Limited, and the twenty-three stockholders, who had intervened "solely for the purpose of taking an appeal," applied for a writ of error returnable to the U. S. Supreme Court.

The application after having been denied by the Chief Justice of the Louisiana Supreme Court, was granted by Mr. Justice White of this Court.

THE QUESTIONS

Involved in the Assignment of Errors.

The Assignment of Errors may be resolved, as we appreciate the case, ito four questions, or groups of questions, which this Court is called upon to consider. These questions are as follows:

I.

Has the State of Louisiana the right to appear as plaintiff in this suit, which is one to oust a corporation, or an association of persons, from the exercise of a corporate franchise, on the alternative grounds of nullity of its charter, or misuser thereof.

(Assignment of Errors 1 and 16.)

II.

Was the citation, addressed to the "New Orleans Debenture Redemption Company of Louisiana, Limited," sufficient and legal, and "due process of law," or was it necessary to address a citation to each and every stockholder of

the Debenture Company before a trial could be had in this suit, and before the charter of the Debenture Company could be annulled or forfeited?

(Assignment of Errors 2, 3, 4, 5, 6, 8, 9, 10, 11 and 14.)

III.

Was the preliminary injunction granted on a supplemental petition filed after the case was argued and submitted, or was the preliminary injunction reinstated before the case was argued and submitted?

Is it true that the preliminary injunction was made perpetual, without notice to, or hearing of any party defendant, and does the injunction deprive the Plaintiffs in Error of their liberty and property without due process of law, or the equal protection of the law?

(Assignment of Errors 7-13.)

IV.

Did the State Supreme Court commit a reviewable error in remanding the case to the trial court to determine whether a receiver should be appointed by the court, a liquidator by the Governor, or the stockholders be permitted to elect their own liquidators?

(Assignment of Errors 13, 15, 16 and 17.)

V.

Was the *debenture business*, as carried on by the debenture company, the **"lawful"** business or avocation of plaintiffs in error?

(Assignment of Errors Nos. 11, 12 and 13.)

ARGUMENT.

I.

Has the State of Louisiana the right to appear as plaintiff in this suit, which is one to oust a corporation, or association, from the exercise of a corporate franchise, on the alternative grounds of nullity of its charter, or misuser thereof.

(Assignments of Error 1 and 16.)

We do not believe your Honors will find any issue involved in this question, which is suggestive of error, reviewable by this Court.

A franchise is a special privilege conferred by the government on individuals, and does not belong to the citizens of a country generally, of common right. Bank of Augusta vs. Earle, 13 Pet. 519.

It is essential to the character of a franchise that it should be a grant from the sovereign authority, and in this country no franchise can be had which is not derived from a law of a State or the United States.

If a franchise is a privileged immunity of a public nature which can not be legally exercised without legislative grant, to be a corporation, is a franchise, etc. **People vs. Utica Ins. Co., 15 John. 387.**

The right to be a corporation then emanates from the State, and can not be lawfully exercised without legislative grant. If there be no such grant, and it is attempted to exercise a corporate franchise without it, the State has the right to intervene to oust the usurpation. If the corporate franchise be granted and accepted, it becomes, in the case of a private corporation, a contract to which the State and the corporation are parties, and the rights of either, under this contract, may be vindicated by an appeal to the courts Text books and authorities concur in these propositions.

Corporations are formed "for definite objects, and their powers and duties are prescribed by law. The State confers upon them a valuable franchise and expects the performance of specific duties. They must exercise their franchises, perform their duties and obey the commands of the law as conditions of their existence. If they fail to travel in the orbits designated by the law of their existence, the State can take away the corporate life which it has created. **No one can take advantage of a breach of the conditions on which a corporation was created for the purpose of depriving it of its franchise, but the sovereignty by which it was created." Elliott on Private Corporations, 236.**

"There are, at common law, two modes of proceeding judicially to ascertain and enforce the forfeiture of a charter for misuser or non-user. One by *scire facias* , and that process is proper when there is a legal existing body capable of acting, but which has abused its power. The other mode is by information in the nature of a *quo warranto*, which is in form criminal, and in its nature a civil remedy, and that proceeding applies when there is a body corporate *de facto* only, and which takes upon itself to act, though from some defect in its Constitution, it can not legally exercise its powers, or when an association assumes to act as a corporation, without even a color of authority. Both of these modes of proceeding are at the instance and on behalf of the State. Private individuals, as we have seen, can not institute proceedings unless there is some statute expressly granting the right to do so. The judgment in such proceedings is that the parties be ousted from the exercise of corporate powers and privileges. The mode of proceeding is now very generally prescribed and regulated by statute, and in suits against States information in the nature of *quo warranto* is the mode in all cases."

The matter is regulated by statute in Louisiana, and the duty is imposed upon the Attorney-General to bring such suits upon his own information or upon the information of private individuals.

We quote from the **Revised Statutes of Louisiana, Section 2593, et seq.:**

"An action by petition may be brought before the proper district court or parish court by the District Attorney, or District Attorney *pro tempore*, and for the Parish of Orleans by the Attorney-General, or any other person interested, in the name of the State upon his own information, or upon the information of any private party against the party or parties offending in the following cases:

"First, when any person shall usurp, intrude into or unlawfully hold or exercise any public office or franchise within this State; or * * * Third, when any association or number of persons shall act within this State as a corporation without being duly incorporated.

"Section 2595. Service shall be made in such cases * * * the same as in other civil suits. * * *

"Section 2602. When defendant, whether a person or a corporation against whom such action shall have been brought, shall be adjudged guilty of usurping or intruding into or unlawfully holding or exercising any office, franchise or privilege, judgment shall be rendered that such defendant be excluded from such office, franchise or privilege, and also that the plaintiff recover costs against such defendant and such damages as are proven to have been sustained."

Section 131 likewise makes it the duty of the Attorney-General to institute proceedings against all banking or other corporations, chartered by the State, to obtain the **forfeituer** of their charters in cases of violations of the same where no

provision has been made by law for the forfeiture of their charters.

It seems clear, therefore, that the State is not only a party who may bring a suit of this character, but is the **only party** who may appear as plaintiff unless otherwise provided by statute. The fact that the State of Louisiana brought suit by petition, in accordance with her laws, to oust the Debenture Company from the exercise of its franchise, or to forfeit the same, certainly involves no federal question. In overruling the exception of the Debenture Company involving this point the State Court committed no error.

In conclusion, we beg your Honors to notice that under the statutes the proceeding is by **Civil Suit** and a **corporation** may be **the defendant**. The question of the service of process and its sufficiency is discussed under the next heading.

II.

Was the citation addressed to the "New Orleans Debenture Redemption Co. of Louisiana, Limited," sufficient and legal and due process of law, or was it necessary to address a citation to each and every stockholder of the Debenture Company before a trial could be had in this suit, and before the charter of the Debenture Company could be annulled or forfeited.

(Assignment of Errors 2, 3, 4, 5, 6, 8, 9, 10, 11 and 14.)

In considering this question there are two possible ways of viewing the legal status of the Debenture Company at the time of the filing of the petition.

First: It was a *corporation* with all the rights and privileges appertaining to such a legal entity and subject to all the laws relative to corporations enacted by the State of Louisiana. It continued to be a corporation, or rather will continue

to be a corporation, until a final judgment is rendered against it, annulling or forfeiting its charter.

Second: It was an *association of persons* without any corporate rights or corporate franchise—an association of persons for the purpose of carrying on a *joint enterprise* under a *common name* and under the directions of some of their members, whom they called *president, secretary, treasurer* and *Board of Directors.*

Let us consider the validity, or rather the constitutionality of the citation from these two standpoints. The citation was addressed to the "New Orleans Debenture Redemption Company of Louisiana, Limited, through its proper officers," and was served upon Walter H. Rogers, in person, as president of said company. If the company be a corporation and remain a corporation until it shall be decreed otherwise, or until its charter has been forfeited, there can certainly be no controversy that the citation is regular, proper, valid and due process of law. We do not understand that there is any difference of opinion on this point, nor can we comprehend how there could be; so that if this Court is of the opinion that the State did not annihilate the defendant corporation by the mere filing of the petition, the conclusion is inevitable that the citation is valid.

The Debenture Company certainly pretended to be a corporation. It took advantage of the corporation laws of the State and framed their articles of agreement in accordance with the Revised Statutes of the State of Louisiana, complying with all the provisions relative to the formation of corporations. The defendant company availed itself of all the rights, privileges and immunities belonging to a corporation organized under the laws of the State of Louisiana. It appeared in court, averring that it was and is a valid legal corporation. Therefore, there can be no injustice in treating the

Debenture Company in the capacity in which its organizers and stockholders desired to be treated. In all suits that may have grown out of transactions between it and third persons who dealt with it as a corporation, it could not be heard to deny its corporate existence. In other words, had it been sued as a corporation in its corporate name, under citation similar to the one issued in this case, served in the manner in which the citation herein has been served, it would have been estopped from denying its corporate existence, if the plaintiff in suit had treated with it as a corporation.

Jones vs. Trustees of Mount Zion, 30 An. 711.

The plaintiff himself in such a case would be estopped from denying the corporate existence of the Debenture Company, and if either estoppel had been set up and maintained in the State Court, would this Court for one moment entertain the question upon writ of error as involving the rights of the parties under the United States Constitution? We think not. We fail to appreciate in what the Federal question would consist. So in this case, we fail to appreciate how and in what manner the jurisdiction of this court extends to the controversy regarding the citation. Whether the Debenture Company be a corporation at the time of the filing of the suit and until final judgment shall have been pronounced, is a question of fact pure and simple, which in no manner can concern a federal tribunal on writ of error. When the Supreme Court of the State of Louisiana decided that it was entitled to corporate existence until final judgment had been pronounced, it committed no error reviewable by your Honors.

Rev. Stat., Section 2595 (already quoted) provides that the service of citation shall be made in suits to oust a corporation from the exercise of a corporate franchise, the same as

in other civil suits, and Section 2602 provides that the corporation may be defendant in such a suit.

In other civil suits against the New Orleans Debenture Redemption Company of Louisiana, Limited, proceedings would have been begun in the same way in which this suit was begun. The citation would have been addressed to the Debenture Company in exact conformity with the citation in this suit and it would have been served in the same way in which the citation was served in this suit; therefore unless the Court is of the opinion that the Debenture Company, or its stockholders, could have brought any ordinary suit before this Court by writ of error, after judgment had been pronounced against it by the Supreme Court of Louisiana, upon the theory that such citation was not "due process of law," we do not appreciate how your Honors can entertain the proposition advanced in this cause on behalf of the plaintiffs in error. Suppose the Debenture Company had been sued for rent by its landlord and such a citation had issued as was issued in this case; that the Debenture Company had alone defended the suit until a final judgment had been pronounced against it; that the Debenture Company had appealed and had been joined in the appeal by its twenty-three stockholders, and that the State Supreme Court had affirmed the judgment of the lower court, would this Court entertain an application for a writ of error in such a case on the ground that the citation was unconstitutional, and that an attempt was being made to deprive the Debenture Company of its property without due process of law? The question carries its own answer, and we see no difference in principle between that case and the case at bar.

The Supreme Court of Louisiana held that the citation had issued properly and had been served in accordance with the terms of the statute governing such citations. It construed

the statute to mean that where a corporation should be sued by the State for the purpose of ousting it from its corporate franchise, either because said corporation was intruding into a franchise to which it had no legal right, or because of misuser, a citation should be addressed to it in the name selected by the members of said corporation and should be served on the persons designated in their articles of agreement. The constitutionality of that statute was never directly called in question by the Debenture Company. Unless the Court construes the general allegation made in the answer of the Debenture Company, that "the purpose of this suit is to deprive the Debenture Company, a duly legally organized corporation, of the legal right to engage in or pursue its business, and that the suit has for its object one which is in violation of the Constitution and laws of the United States," into a specific attack upon this statute governing the issuance, service and form of citation in this suit, the conclusion is inevitable that so far as the citation is concerned, no federal question has been properly raised.

Oxley Stave Company vs. Butler County, 166 U. S. 648.

Let us now view the Debenture Company as an association of individuals without corporate existence. Is the citation valid and does it constitute due process of law? The Supreme Court of Louisiana also discussed the question from that standpoint. It determined as a matter of fact that all persons claiming to be stockholders were bound by the terms of the contract which they entered into, and which they denominated a charter. By the terms of this contract they agreed and elected to be sued under the name of the "New Orleans Debenture Redemption Company of Louisiana, Limited," and further agreed that all citations and other legal process should be served on one of their number whom they had chosen as president. The president was therefore constituted the **common agent** of

all persons connected with the Debenture Company as stockholders, and he was specially authorized to receive citation. The terms of the contract between the parties expressly stipulated that they should be sued under the name of the New Orleans Debenture Redemption Company of Louisiana, Limited. If the parties had never attempted to form themselves into a corporation but had signed articles of copartnership containing the above provisions, it is clear that a citation addressed to them in the manner and form set forth would be valid and legal. But even if the charter is null and is to be considered null from the moment of the filing of the petition against the Debenture Company, certainly it is good as articles of copartnership. The business carried on would not be a *corporate* business but the business of a copartnership, but a citation would be valid if addressed to the concern in the name under which it carried on business with the public. Here again we fail to appreciate in what manner the jurisdiction of this Court attaches. The Supreme Court of Louisiana in holding that Walter H. Rogers was the agent of all the defendants and that therefore they were bound by the judgment, merely decided a matter of fact. Whether or not Walter H. Rogers is a properly constituted agent for the purpose of receiving citation is not an issue involving a federal question; it is a mere matter of evidence.

In discussing this citation from the alternative standpoints; first, that the Debenture Company is a corporation until a judgment is pronounced against it, and, second, that it was at the time of the filing of the petition a mere association of individuals, we neglected to call the attention of the Court to the fact that this suit is brought against the Debenture Company not only on the theory that it has unlawfully intruded into a corporate franchise, but the alternative plea is set forth in the petition that its charter is subject to forfeiture because

inter alia the corporation has violated the Constitution of the State regarding the issuance of stock. The Supreme Court of Louisiana held that a suit could be brought upon the alternative grounds alleged in the petition. The opinion of the Court expressly finds that the Debenture Company has been guilty of issuing fictitious stock in violation of the Constitution of the State of Louisiana. The penalty set forth in Article 266 of the New Constitution (Article 258, Constitution of 1879) is the forfeiture of its charter should a corporation be found guilty of such an act. Let us disregard that portion of the prayer of the petition which seeks to oust the corporation from the exercise of its corporate franchise on account of the illegal character of its business, and let us look at the case as one to forfeit the charter of a valid corporation for misuser. How should the citation be served? How should it be addressed? Manifestly to the New Orleans Debenture Redemption Company of Louisiana, Limited, for certainly it can not be contended that in such a suit citation should be addressed to each and every stockholder before the charter could be forfeited.

The brief of counsel for plaintiffs in error was received by us while we were correcting the proof of our brief. We notice on page 11 of plaintiffs' brief that counsel "eliminates all allegations contained in the petition which relate to forfeiture of the charter," and "limits the case here to those allegations alone which support the prayer of the petition for the 'nullity' of the charter demanded." On page 34 of the same brief, we are gravely told that the demand for forfeiture of the charter "dropped out of the case when the final judgment of the District Court was rendered on March 2, 1899."

We are finally told that the plea of misuser of the corporate franchise based on the allegations as to the fictitious stock, is no longer involved, because the State failed to an-

swer the appeal taken by the Debenture Company, and pray for the amendment of the judgment.

As already set forth, the petition contained alternative pleas, although the relief sought was practically the same.

The petition alleged the absolute nullity of the charter on the ground of the illegality of the business; and in the alternative that the charter should be forfeited for misuser of the corporate franchise. The relief sought was to oust the Debenture Company from the franchises into which they had intruded, to perpetually enjoin the company, its officers and agents from thereafter carrying on the debenture business under their charter, and to liquidate the affairs of the company.

It could make no difference to the State upon which ground the trial court decided to rest its judgment.

Alternative pleas are permitted and sanctioned by the jurisprudence of Louisiana, because they avoid a multiplicity of suits.

30 Annual, 1263, Johnson vs. Meyer.

34 Annual, 687, Chaffe vs. Greene.

27 Annual, 98, Smith vs. Donovan.

16 Annual, 189, Weber vs. Gaillard.

It was for that reason that the exception interposed by the Debenture Company, claiming that the causes of actions were contradictory, was overruled by the trial judge, whose ruling was sustained by the Supreme Court in a similar case argued together with this cause.

See **51 Annual, 795, State vs. Louisiana Debenture Company**.

The contention of the learned counsel of the Debenture Company now is that a serious accident happened to the State's petition when the lower court rendered a judgment in its favor. We have labored under the impression that the

judgment of the lower court was as absolutely in favor of the State as could be desired. It is an absolute and unqualified judgment of ouster. It forbids the Debenture Company, its officers and agents, from exercising a corporate franchise by a perpetual injunction.

Upon what theory did a part of the State's petition "drop out" of the case when such a judgment was rendered? What portion of the judgment annihilates the plea of misuser? Counsel tells us that the State is deprived of this plea because forsooth the trial judge rested his decision upon the nullity of the charter! There can be no doubt that the language in which the judgment is couched shows that Judge Monroe considered the charter null and void *ab initio*. We may conclude that he saw no necessity for passing upon the plea of misuser. The character of the judgment, however, would have been the same had the learned judge rested it upon the alternative plea. The judgment in either event would have been one of ouster, although the verbiage might have been different.

Such a judgment could not and did not eliminate one of the issues from the cause. The doctrine advanced by counsel for plaintiffs is a new one, and we observe that he has cited no authorities to maintain his statement.

His next contention is that plea of misuser disappeared from the case, because the State failed to file an answer to the appeals, and pray for an amendment of the judgment of the lower court.

It is perfectly true that the Code of Practice provides in Article 888 as follows, viz.:

Prayer for Amendment.—If the appellee has cause to complain of the judgment appealed from he may, without appeal on his part, state in his answer the points on which he thinks he has sustained wrong, and may pray that the

judgment be reversed with respect to them, and confirmed with costs on the rest.

The State would indeed be hard to satisfy if it could find any cause to complain of the judgment of the lower court. We can not discover in what respect the State "sustained wrong."

Article 889, which is cited by our learned opponent, provides that there shall be no subsequent appeal by an appellee who does not pray that the "judgment be reversed on those points which are prejudicial to him."

We fail to see its applicability, as we can find nothing in the judgment prejudicial to the State. The Code of Practice (Art. 891) further provides that the case can be heard without the appellee having filed an answer and the judgment shall not be the less valid.

It seems to us that it would have been folly on our part to have asked for an amendment of the judgment of the lower court. It absolutely granted the relief prayed for. It excluded the debenture company from its corporate franchise, and in that respect conforms with the provision of Section 2602 of the Revised Statutes which provides for the kind of judgment to be rendered in such cases.

Any modification of the judgment that it is possible to imagine would be in favor of the appellant, not in favor of the appellee. Hence, it was not incumbent upon the appellee to answer the appeal and to pray that the judgment be reversed on any point.

The complaint of the appellant brought the judgment before the Louisiana Supreme Court, for review, and that tribunal considered that either plea of the State of Louisiana upheld the judgment of the lower court.

The brief of the plaintiffs in error is limited to those "allegations alone which support the prayer of the petition for the

nullity of the charter demanded" (p. 11). We gather from the language employed that should this tribunal hold that the Supreme Court of Louisiana committed no reviewable error in maintaining the right of the State to advance both pleas contained in the petition in support of the judgment of the lower court, and in further maintaining that both pleas were sustained by the law and the evidence, then the plaintiffs admit the lack of an argument to sustain their position.

It seems to us a proposition too plain for argument that a suit for ouster on account of misuser must be brought against the corporation by its corporate name under any system of law. It also seems plain that the present cause comprehends and embraces such an action. The suit was properly brought against the proper defendant and the citation constitutes due process of law.

It seems to us from whatever standpoint we view the question of citation there is no federal question presented for decision. Even were there a federal question involved, it seems plain that the case was decided on independent grounds broad enough to maintain the judg ment. **Beatty vs. Benton, 135 U. S., 244; Hammond vs. Johnson, 142 U. S., 73; Bacon vs. Texas, 163 U. S., 207; Moran vs. Horsky, 178 U. S., 207.**

Let us now consider what effect, if any, the appearance of the other twenty-three plaintiffs in error in the proceedings had upon the question of citation. These twenty-three persons claiming to be stockholders, made themselves parties to the suit after final judgment had been rendered by the lower court. They availed themselves of provisions of the Code of Practice of the State of Louisiana relative to appeals by third persons. The Code of Practice allows all third persons interested in a litigation to intervene in a suit for the protection of their rights and for the purpose of taking an ap-

peal. In other words, they can make themselves parties to the litigation, **but if they do they are certainly bound by the final judgment rendered on appeal.** They must issue citation to all parties of record before they are recognized as intervening parties (**See Code of Practice. Article 571; Escobas vs. Calcasieu Sulphur Mining Company, 33 An. [La.] 484; State vs. Wickliffe, 21 An. [La.] 755**).

The State of Louisiana accepted service of citation of the intervention filed by the stockholders, and from that time on they have been parties to the litigation and have been seeking to set aside the judgment of the lower court, not only on the ground of want of personal citation, but for the purpose "of taking and prosecuting an appeal to the end that on said appeal they may be enabled to be heard and to reverse, annul and set aside all of said proceedings in said matter."

The voluntary appearance of a defendant in court for any other purpose than to object to the want of citation has been held under the law of Louisiana to waive its necessity. **Code of Practice. Art. 206; Tutorship of Minors Byland, 38 An. 757.**

Granting, for the sake of argument, that these stockholders are defendants because the action contemplates the issuance of an injunction against them *as stockholders*, and that each and every one of them is entitled to a personal citation, the want of such citation has been cured by their appearance for other purposes than merely to object to the want of citation.

That these stockholders did not choose to make themselves parties to the suit until after the case had been tried in the lower court, does not alter their position or add to their rights. This Court has upheld the validity of a statute of Texas, which provides that the appearance of a defendant for

any purpose whatsoever, dispenses with the necessity of citation. **Kauffman vs. Wootters, 138 U. S. 285. See York vs. Texas, 137 U. S. 15.** We conclude that the constitutionality of our statutes is unassailable.

No federal question was ever raised by these twenty-three plaintiffs in error in the lower court; they did not complain of the proceedings as being in contravention of the provisions of the United States Constitution in their appearance in the lower court, nor did they complain before the Louisiana Supreme Court until after judgment had been rendered and they filed their application for a rehearing. Therefore, so far as they are concerned, the Court is relieved of the necessity of considering whether or not there be a federal question involved in this suit. Under these circumstances they were not entitled to a writ of error nor to be considered as plaintiffs in error.

The fact that a Federal question may have been raised by the Debenture Company in its corporate capacity would not entitle the other twenty-three plaintiffs in error to appear here; the question was not raised by them, and they can not avail themselves of the fact that it may have been raised by the Debenture Company. We say it was not raised by them because it was too late for these plaintiffs in error to raise a federal question in an application for a rehearing.

Conceding that the Debenture Company in its corporate capacity raised a federal question, these stockholders can not avail themselves of the plea. They are third persons *quoad* the corporation.

We submit that the following principles have been well settled and are applicable, viz.:

Federal questions must be raised by the parties in the lower court. It is too late to raise such questions in an ap-

plication for a rehearing after an appellate tribunal has rendered judgment.

Miller vs. Cornwall Railway Co.. 168 U. S. 131.

The right or immunity must be one of the plaintiff in error and not a third party.

Texas & Pacific Railroad Company vs. Johnson, 151 U. S. 81; Giles vs. Little, 134 U. S. 645; Ludeling vs. Chaffe, 143 U. S. 301.

The proposition is reduced to this: The right of personal citation addressed to each and every stockholder belongs to the stockholders and not to the corporation; the want of personal citation could be complained of by the stockholders and not by the corporation; they alone could invoke the protection of the Federal Constitution; as a matter of fact no such action was taken by them, but by the corporation on their behalf; hence a federal question was not raised at the proper time by the proper parties.

If the Debenture Company claimed to be a corporation and were the only plaintiffs in error here, the Court would not have very much difficulty in disposing of the contention that the citation was not due process of law. It is only when we look at the question from the standpoint of the other twenty-three plaintiffs in error that we find any room for discussion. If the validity of the citation, or rather its constitutionality, can not be questioned by the stockholders because they failed to raise a federal question at the proper time, it certainly can not be said that the Debenture Company, as a corporation, has an interest in the dispute. It appeared in court and made answer; it tried the case upon the merits, and averred and contended throughout the litigation that it was a valid, legal corporation. Certainly the Company can not here contend that there was not due process of law because it is not a corporation.

In the foregoing argument we have purposely refrained from discussing what would have been the mode of procedure under the ancient writ of *quo warranto*, or under the statutes of other States which provide for an information in the nature of the *quo warranto*. We are aware that there are decisions, construing particular statutes, which hold that where the corporate existence is at issue, the information in the nature of a *quo warranto* should be filed against the members and not against the illegal corporation, by its corporate name. There are likewise other decisions which hold that where the forfeiture of a franchise held by virtue of a valid incorporation is sought, the information must be against the corporation and not against its officers or members.

State vs. Taylor, 25 Ohio St. 279.

And in the State of New York, where there is a special statute governing proceedings of this kind, the Supreme Court in the case of **The People vs. The Bank of Hudson, 6 Cowen, p. 218**, held as follows:

"It is objected in the first place that the information, being against the defendants by their corporate name, is bad. To this it may be answered, the information is merely descriptive. It is not an affirmation that the defendant are a corporation; but that, by the name of *the President and Directors and Company of the Bank of Hudson*, or using that name, they have done the acts in the information alleged. And it then calls on them to answer, by what authority. Besides, the statute authorizes the proceedings against the corporation. The judgment must be against the corporate name. A corporation, created by the Legistature, may lose its franchises by misuser or a non-user of them. They may be assumed by the government under a judgment upon *quo warranto*, to ascertain and enforce the forfeiture (**9 Cranch. 51.**) The judg-

ment to be given is a judgment of seizure which produces a dissolution of the corporation."

The case of the **People vs. Ravenswood, etc., Turnpike & Bridge Co.**, decided by the Supreme Court of New York and reported in **20 Barbour, p. 521**, is also interesting as an interpretation of the statutes of New York governing cases of this kind.

It seems that the defendants in that case raised the objection that several causes of action were improperly joined, insisting that one cause treats the corporation as never having existed, and the other as having once existed and then lost its right to a continued existence, and that these are inconsistent allegations and the judgment to be rendered on them incompatible. The Court held that this mode of pleading is deliberately sanctioned by the jurisprudence of New York State. The opinion says:

"There is but one subject matter in this cause—the right of the defendants to continue to exercise certain franchises. That right may be decided against them by showing that they did not comply with conditions precedent to the origin of that right, or to conditions subsequent, and in either case the judgment is that they be excluded from such franchises (Code, Par. 440.443, etc.)

"The Code recognizes that the action may be against the corporation for either kind of usurpation of franchises when it provides (Par. 441) that the judgment, whether against a natural person or association, if they are found guilty of usurping a franchise, shall be that they be excluded from such franchise."

The organ of the Court in that case was Judge Mitchell, and his opinion was concurred in by Judge Cowles for separate reasons. Judge Cowles held that, "the plaintiff had recognized the corporate existence of the corporation by suing it by its corporate name, but the plaintiff showed that the cor-

poration had been guilty of misuser and for that reason the demurrer was properly overruled."

The reasons assigned by Judge Clerke, who also writes a concurring opinion, are somewhat similar to those of Judge Cowles.

The analogy between the case of The People vs. The Turnpike Company and the present suit is somewhat striking, as it will be remembered that in this case the exceptions filed by the defendant are almost identical with the demurrer filed by the Turnpike Company.

We insist, however, that your Honors need not consider the correctness of such decisions rendered by State tribunals. They have no application whatsoever to the issue presented to this Court for determination. The question, as we understand it, is not whether the law of Louisiana could have provided a different procedure or a different kind of process. The question is not whether it could not have provided for an action to be brought on an information in the nature of a *quo warranto*, against individuals who usurp or who attempt to usurp a corporate franchise. But the question is whether the statute of Louisiana, as interpreted by the Supreme Court of the State of Louisiana, which provides that the suit shall be brought against the corporation, or pretended corporation, in its corporate name; that the suit shall be civil in its nature; and citation shall issue to the defendant as in other civil suits; is unconstitutional because it does not provide for due process of law. This is the federal question which will be considered by this Court, unless your Honors conclude that it was eliminated from the case because the Louisiana Supreme Court based its decision upon other grounds.

160. U. S. 391. Iowa R. R. vs Iowa
95 U. S. 735. Pennoyer vs Neff.
9 Ex. 345. Copin vs. Adamson
4 Ex. 290. Vallee vs. Dumergue
18 Howard. 404. Lafayette Ins Co
vs. French

III.

Was the preliminary injunction granted on a supplemental petition filed after the cause was argued and submitted, or was the preliminary injunction reinstated before the case was argued and submitted?

Is it true that the preliminary injunction was made perpetual without notice to or hearing of any party defendant, and does the injunction deprive the plaintiffs in error of their liberty and property without due process of law?

Assignment of Errors, 7-13.

The statement of facts which forms the foundation of the seventh paragraph of the assignment of errors is so misleading and inaccurate as to call for contradiction. The history of the injunction issued *pendente lite* is briefly as follows:

A preliminary injunction was applied for by the State of Louisiana upon the filing of its petition, for the prayer of the petition contemplated an injunction of such a sweeping nature as to prohibit the defendant corporation, its president, secretary, general manager, officers, agents, directors and stockholders from acting as a corporation and from doing business under its pretended charter.

The State desired to prevent the defendant corporation from doing any act whatsoever during the pendency of the suit that might prejudice the rights of its creditors or the rights of anybody having contractual relations with it. It is not disputed by the plaintiffs in error that under the law of Louisiana a petitioner may be granted a preliminary injunction upon swearing to the facts stated in his petition and upon giving bond in such an amount as may be fixed by the Court. When the State itself is the plaintiff, no bond is required and the affidavit of the Attorney-General is sufficient-

We do not understand that the constitutionality of the statutes governing the issuance of preliminary injunctions upon bond and affidavit, or without bond in the case of the State, and without a previous notice and hearing, has been raised by the Debenture Company. The plaintiffs in error do not complain of the issuance of the injunction immediately after the filing of the original petition. The Debenture Company moved the Court to set aside this preliminary injunction upon the giving of bond as the law directs, and argument was heard upon that motion on May 25, 1898. On the 26th day of May, the trial Judge made the rule of the Debenture Company absolute in so far as to order that the injunction issued be dissolved and set aside without prejudice to the State's right on a final decision of the case. (Trans., p. 7.) On March 2, 1899, a preliminary injunction was again applied for by the State of Louisiana, and a supplemental petition was filed setting forth the necessity for such a remedy. This petition was presented to the trial Judge before the case was argued and submitted, **and not afterwards**, as stated in the Assignment of Errors. The trial Judge refused to grant this injunction *pendente lite* until he had heard the Debenture Company present its case. The order of court on page 388 of the Transcript distinctly says that "**since said petition was first presented, the Court has heard the defendant (the Debenture Company) present its case fully and argue same through counsel.** It is not true that the Debenture Company had no opportunity to be heard concerning the issuance of this preliminary injunction; on the contrary, the trial judge called the attention of counsel for plaintiffs in error to the fact that the petition had been filed and asked for argument thereon. It is, therefore, a fact that the plaintiffs in error had notice of and an opportunity to be heard upon the supplemental petition and the injunction

therein asked for. We can hardly speak of the statements contained on page 64 of plaintiffs' brief with patience. They amount to a deliberate accusation that the trial judge altered the final judgment after it was rendered. Not only is the statement made that the injunction was granted after final judgment, but finding themselves contradicted by the order granting the injunction and the final judgment signed by the Hon. Francis A. Monroe, now a Justice of the Supreme Court of Louisiana, the plaintiffs in error charge that the record is untrue. Needless to say, there is no evidence of the truth of the assertions in the record. Our only regret is that the Louisiana Supreme Court found it unnecessary to pass upon the writ of *certiorari* sued out by the Debenture Company, as the return of the trial judge filed in said cause was a complete refutation of a charge similar to the statements made in plaintiffs' brief.

51 La. Annual, 1824.

But the injunction as issued for the second time is no broader than could have been originally granted by the Court upon the original petition. Had it issued immediately upon the filing of the original petition, we understand that the plaintiffs in error concede that they would have no cause of complaint. We, therefore, can not appreciate in what way their rights have been affected by its reissuance a few hours before the final judgment was rendered.

But the preliminary injunction has passed into history, it has been superseded by the final judgment of the lower court, which in turn has been superseded by the various decrees of the State Supreme Court rendered originally and on rehearing.

The pertinent question is whether the injunction now in force, which is a part of the final judgment of the lower court as affirmed and modified by the Supreme Court, de-

prives the plaintiffs in error of their "liberty, privileges, immunities and property without due process of law and denies them the equal protection of the laws of the State" (Error 7), or deprives them of "their liberty to pursue a lawful business and the right to administer their own private property and affairs and to settle their own private business and financial affairs in the manner agreed upon among themselves" (Error 13).

The question of "due process of law" has been discussed by us under the second group of questions. This Court will not disturb the decree of the State Supreme Court in any particular unless the conclusion is reached that citation should have issued to each and every person owning a share of stock in the Debenture Company and that they have not forfeited the right to raise such an issue by voluntarily becoming parties to the suit. The definitive injunction is merely a part of the judgment upon the merits, and will stand or fall with it.

The scope of the injunction should be examined into when considering whether it interferes with the "private" business, property affairs, and the "liberty to pursue a lawful business" of Plaintiffs in Error.

The judgment of the lower court restrains the Debenture Company, its officers and directors and agents from disposing of the assets of the **corporation**, or of carrying on the debenture business **of the corporation**, and perpetually enjoins "said company, its officers, agents, representatives and members" from acting in a corporate capacity. (Transcript, pp. 389-390.)

The judgment is not directed against the disposition of the private property of individuals by individuals, or the carrying on of a private business by an individual. The injunction restrains the Plaintiffs in Error from disposing of corpo-

rate property, and of pursuing a debenture business as a corporation.

The right to carry on business as a corporation does not belong to citizens. It is not a liberty to which they are entitled by virtue of their citizenship. The Constitution of the United States does not guarantee them the right to form themselves into corporations and to carry on business as such. The State of Louisiana has the power to enact a law that hereafter none of its citizens shall enjoy the privilege of pursuing a business as a corporation. Hence we say that the injunction infringes on none of the constitutional rights of Plaintiffs in Error.

Another pertinent inquiry is how far the State Supreme Court modified the injunction when it left the matter of the disposition of the assets of the Debenture Company an open question and remanded the cause to the lower court for further proceedings. This we will discuss under the fourth heading.

IV.

Did the State Supreme Court commit a reviewable error in remanding the case to the trial court to determine whether a Receiver should be appointed by the Court, a Liquidator by the Governor, or the stockholders be permitted to elect their own Liquidators?

It may possibly be a surprise to the Court to learn that the State Supreme Court did not finally determine what should be done with the property and assets of the Debenture Company. So far from depriving the plaintiffs in error of their property or the right to settle the business and administer the corporate assets, which in the assignment they call "their own private" property, affairs and business, the judgment is not final and leaves the entire matter an open question. In

passing upon the applications for a rehearing, the question of liquidation was remanded to the trial court. The fact that the decree of the Supreme Court is not a final one, is important from many points of view. Let us first consider the effect of this modification of the decree upon the question of the injunction. We may presume that the decree does not contemplate that it should remain in force any longer than necessary. Had not this case been carried here by writ of error, the trial court would have had to take up the case and try the issues remanded to it. It would have rendered another judgment and would have decided that the liquidation should be conducted by a Receiver or Liquidator under the control of the Court; or that the parties in interest should be allowed to liquidate their own affairs and, of course, to retain possession of all the corporate assets and to dispose of them in accordance with their contracts unhampered by any judicial supervision. We therefore say that the lower court was reinvested by the Supreme Court with jurisdiction to determine important issues.

The determination of these issues involved not only the disposition of the entire corporate assets, but the modification of the injunction in so far as it prohibits the plaintiffs in error from taking the corporate assets beyond the jurisdiction of the court, and enjoins them from altering or changing their contractual relations with third persons. Were the lower court to decide, for instance, that the plaintiffs in error should be allowed to liquidate the affairs of the Debenture Company, it would necessarily set aside the injunction in so far as it restrains them from disposing of the assets. In fact, the only part of the injunction that would remain in force is that prohibiting them from acting in a corporate capacity.

The plaintiffs in error are not as yet deprived of their property. The decrees of the Supreme Court do not dispose of any property. Certainly the complaint of the plaintiffs in error is previous. They have cried out before they are hurt. It is wrong for them to say that the decree deprives them of the assets of the Debenture Company, when the judgment reserves them the right to prove that the property is theirs and that they should be allowed to dispose of it.

Thus we see that the decrees brought here for review do not embrace the matter complained of in the assignment of errors, paragraphs 13, 15, 16 and 17. The injunction is addressed to the corporation and its agents, and forbids the doing of corporate business; it is not addressed to individuals and does not prohibit any person from carrying on a lawful avocation. The injunction does not deal with the disposition of the assets of the Debenture Company, and so far as it restrains plaintiffs in error from disposing of them it is merely temporary, it is not final, and it can be set aside by the lower court, to which the case has been remanded.

Nowhere in the pleadings will your Honors find that the plaintiffs in error ever contended that the property of the Debenture Company belonged to them as individuals, so that the complaint stated in paragraph 15 loses much of its force. The State Court could not be expected to hold that the assets of the Debenture Company were the individual property of the stockholders, when they failed to set up such a claim, and the Debenture Company, whom they joined as co-defendants, always maintained that its assets were corporate property. It seems to us that the plaintiffs in error should be contented that the State Supreme Court has afforded them an opportunity of raising the issue, and asserting their right to the possession of the assets.

The question of finality of the decrees of the State Supreme Court is important in considering whether the case can be brought to this Court by writ of error in its present condition.

This Court has frequently held that a decree which remands a case to the lower court for further proceedings is not final for the purpose of a writ of error.

In **Union Mutual Life Insurance Company vs. Elizabeth Kirschoff**, 160 U. S. 374, a writ of error was taken to review a decree of the Supreme Court of Illinois, which reversed the decree of the trial court, with directions to this court to enter an order and decree in conformity with the opinion. The writ was dismissed because the decree was not final.

In **Rice vs. Sawyer**, 144 U. S. 197, a similar ruling was made.

In **Lodge vs. Twell**, 135 U. S. 232, Mr. *Chief Justice Fuller* delivered the opinion of the court, and after reviewing previous decisions, laid down the following general principles:

"(1) Where something more than the mere ministerial execution of the decree as rendered is left to be done, the decree is interlocutory and not final even though it settles the equities of the bill."

"(2) A decree to be final for the purposes of an appeal must leave the case in such a condition that if there be an affirmance here, the court below will have nothing to do but to execute the decree it has already entered."

Upon the latter proposition the authorities are uniform, said *Chief Justice Waite* in **Dainese vs. Kendall, 119 U. S. 53**, from which we quote below.

"The litigation of the parties on the merits of the case has not been terminated. An account of the rents collected by Kendall while in possession has not been taken, and the

amounts due Dainese and Kendall respectively on the notes which they severally hold have not been ascertained.

All this is necessary for the purposes of the relief asked for in the bill, and the cause was sent back from the general term for further proceedings on that account The authorities are uniform to the effect that a decree to be final for the purposes of an appeal must leave the case in such a condition that if there be an affirmance here, the Court below will have nothing to do, but to execute the decree it has already entered" (citing):

Bostwick vs. Brinkerhoff, 106 U. S. 3.

Grant vs. Phœnix Ins. Co., 106 U. S. 431.

St. Louis, etc., R. R. Co. vs. Express Co., 108 U. S. 28.

Ex Harte Norton, 108 U. S. 242.

Mower vs. Fletcher, 114 U. S. 127.

Probably the fullest analysis of the adjudicated cases concerning the finality of decrees may be found in

McGourkey vs. Toledo and Ohio Central R. R. Co., 116 U. S. 536, where the Court held that a decree to be final must be determinative of **all matters within the pleadings**.

Let us, then, examine the matters which are embraced within the pleadings in this cause. The prayer of the petition of the State of Louisiana asks for the following relief, and creates the following issues, viz.:

(1) Ouster from corporate franchise.

(2) An injunction prohibiting the further use or exercise of a corporate franchise.

(3) An injunction *pendente lite* to preserve the *status quo* until the entire cause has been disposed of.

(4) A liquidation of the business and affairs of the Debenture Company and a distribution of its assets by a liquidator to be appointed by the Governor of the State, or a re-

ceiver to be appointed by the Court, but in either event to be carried on under the supervision and control of the Court.

We may concede the finality of the decrees rendered as to the first three issues for the purpose of this argument, but how about the fourth? It is far from settled. The Supreme Court remanded the cause on that issue, saying:

"**The illegality of the charter was decreed. The Court considered that as to liquidator or receiver vel non contradictorily with parties in interest the question can be considered in the District Court, to which the judgment is remanded for execution.**

"**The whole question as to the appointment of liquidator or receiver was left at large and to be considered as an original question. Whether the appointment of a liquidator lies with the Governor, or of a receiver with the Court, or the parties in interest, we do not determine. It is left an open question.**"

Transcript, page 430.

It is patent that the decree is not final "as to all matters within the pleadings." Something more than the mere ministerial execution of the decree as rendered is left to be done, for the cause is remanded for the trial of one of the most important issues between the parties, and hence the decree is not final according to the first rule laid down in Lodge vs. Twell (*supra*).

Testing it by the second rule laid down in that case, we come to the same conclusion, because the decree does not leave the case in such a condition that if there be an affirmance here the court below will have nothing to do but to execute the decree it has already entered

FIFTH QUESTION.

Was the debenture business, as carried on by the Debenture Company, the "lawful business" or avocation of plaintiffs in error?

(Assignment of Error 11, 12 and 13.)

We are of the opinion that the judgment of the Louisiana Supreme Court will be considered by this Court final upon the question of the legality of the debenture business, and whether or not the corporation laws of Louisiana permit the incorporation of this scheme or business.

The opinions of the Louisiana Supreme Court in this case, and similar cases, which were decided at the same session, discuss the character of the debenture business with much particularity. That tribunal found that Act No. 36 of 1888, known as the "Limited Liability Act," was not intended as a statutory warrant for the incorporation of any business of the character carried on by this Debenture Company. A business may be legal, and yet there may not be in the laws of the State a statutory warrant for its incorporation, and hence the issue before the Supreme Court was in reality whether the business could be incorporated, and not whether it was intrinsically illegal. However, as Act 36 of 1888 permits the incorporation of "any lawful business or enterprise not inconsistent with the Constitution and laws of the State," the Louisiana Supreme Court necessarily considered the legality of the scheme in order to determine the issue before them.

Our only excuse for presenting the details of the debenture scheme is that numbers 11, 12 and 13 of the Assignment of Errors seem to indicate that the plaintiffs in error consider that this court has jurisdiction to inquire into the legality of the business.

THE DEBENTURE SCHEME OF PLAINTIFFS IN ERROR.

The sole and only business of this Debenture Company was the issuance of instruments which they called debentures, and upon which they borrowed money on the installment plan. The Debenture bond which was issued and sold by the plaintiffs, reads as follows, viz:

"INCORPORATED UNDER THE LAWS OF THE STATE OF LOUISIANA.

Number —. 216 Dollars

THE NEW ORLEANS
DEBENTURE REDEMPTION COMPANY
OF LOUISIANA, Limited.

This Debenture to————upon————written and printed application, dated————189—, and in consideration thereof, and of the payment in advance of TWO DOLLARS, and of the monthly payments of TWO DOLLARS, to be made thereafter, at the office of the Company, in the City of New Orleans, or to any duly authorized local depository on or before the first day of each month in every year, following the date hereof, during the existence of this contract, until SEVENTY-TWO MONTHLY payments shall have been duly paid to the said company.

THE NEW ORLEANS DEBENTURE REDEMPTION COMPANY OF LOUISIANA, Limited,

Does promise to PAY to the said————in SIX YEARS from the date hereof (unless sooner redeemed, in accordance with the terms and conditions endorsed hereon and made part of this contract) the sum of TWO HUNDRED AND SIXTEEN DOLLARS upon the delivery and surrender of this Debenture to this Company.

In Witness Whereof the undersigned officers of said Company have signed and delivered this Debenture at the City of New Orleans, Louisiana, this first day of————, One Thousand Eight Hundred and Ninety—.

———————

President.

———————

Secretary.

CAPITAL STOCK $100,000.

The terms and conditions upon the reverse of the Debentures, which are made a part of the contract, read as follows:

"TERMS AND CONDITIONS.

APPLICATIONS.

Debentures shall be issued only on application made in writing on a printed form prepared by the Company.

PAYMENTS ON INSTALLMENTS.

Payments on Debentures shall be Two Dollars due and payable in advance on the FIRST day of each month by THREE o'clock p. m., a failure to pay said installments on or before the FIFTH day of each month by THREE o'clock p. m. shall forfeit all payments made and make null and void the Debenture on which the installment is due and unpaid.

If the FIFTH falls on Sunday or other legal Holiday, payments must be made the following legal day, before THREE p. m.

NON-FORFEITURES.

Thirty days after such forfeiture, upon the delivery and surrender of the Debenture or Debentures to the Company,

the debenture holder will be entitled to receive a return in cash of fifty per cent. of the monthly installments paid; provided, seven monthly installments have been paid.

DAYS OF REDEMPTION.

The Days of Redemption are the Tenth of every month. If the Tenth falls on Sunday or other legal Holiday, the redemption shall be on the following legal day. Debentures are numbered and redeemed in numerical order.

TERMS OF REDEMPTION.

Debentures will be redeemed from month to month in regular numerical order, after seven monthly payments.

NON-TRANSFERABLE.

In consideration of the New Orleans Debenture Redemption Company of Louisiana, Limited, issuing this Debenture, it is mutually agreed that same shall be Non-transferable before maturity."

An examination of this instrument, together with the application signed by the party proposing to buy it, and the terms and conditions on the reverse thereof and of the charter of the company, will show that the Debenture Company promises to pay the sum of $216.00 at the end of six years, upon the payment to it of $144.00 in monthly payments of Two Dollars per month, during a period of six years, or seventy-two months. If the holder of the debenture, however, should fail to make any of his monthly payments to the company before the expiration of seven months, he forfeits all he has paid in and all rights under the debenture. If he fails to make a payment after his bond has become seven months old, he forfeits all he has paid, but he may surrender

his debenture and get one-half of all the money he has paid nto the treasury of the company.

The money received from debenture holders monthly is, in accordance with the scheme, divided into three funds: 65 per cent. of the entire amount paid into the company upon its obligations, is put into the redemption fund; 25 per cent. is put into the reserve fund, and 10 per cent. of the entire amount is put into the expense fund.

The redemption fund is used for the purpose of redeeming debentures before their maturity. After the company has been in operation for seven months, under its plan, it commences the redemption of debentures. A bondholder who has paid in seven monthly payments, amounting to $14.00, is entitled to receive from the company the sum of $21.00, if it is redeemed at that age. The company redeems its bonds in numerical order, commencing with the first one issued and proceeding in accordance with the numbers borne by the bonds. Therefore, if the company redeems a bond in seven months it will have received from the holder of the bond $14.00 in monthly installments, paid in during seven months, and thus have had in its possession the money of the bondholder for an average period of three and one-half months. For the use of this money for that period it pays the holder of the bond 50 per cent. profit. This, by actual calculation, amounts to a profit of 171 per cent. simple interest per annum. The scheme, therefore, amounts to this: The company binds itself to pay the bond at the end of six years, if not sooner redeemed. If the bond is not redeemed prior to its fixed maturity, the investor receives 50 per cent. profit for the use of his money for an average period of three years, for he does not pay it in the office of the company at one time, but in monthly payments. Therefore, the company will pay to the holder of the matured bond a profit which by

actual calculation amounts to at least 13 per cent. compound interest per annum.

This is the scheme which the learned counsel for defendants tell us is legal and practicable. This is the scheme which they tell us will not bring disaster to all those who place their trust in it; the scheme which, forsooth, proposes to pay to investors a maximum interest of 171 per cent. per annum and a minimum interest of 13 per cent. compound interest per annum.

On its face it is chimerical. No company can afford to borrow money and pay such rates of interest; no lawful enterprise can borrow money on such terms, and the very fact that these companies do pretend to have the ability to pay such interest, stamps them, in our opinion, as illegal corporations, full of danger to the commonwealth.

The reserve fund of 25 per cent., we are told, is to be invested and re-invested, and is a guaranty that such bonds as may arrive at maturity will be paid. Although in the circulars issued the defendants propose to earn large amounts of compound interest, as a matter of fact the evidence shows that very little interest was earned by any of the companies. The New Orleans Debenture Company, instead of increasing its reserve by earning interest, after an existence of over four years, has actually diminished the reserve. The amount realized from setting aside 25 per cent. from installments paid in by debenture holders was a little over $200,000.00, yet the reserve fund at the present time amounts to only $199,000.00 in round numbers.

Ten per cent. of the entire amount is set aside for the expense fund. Under the terms of the charters this fund is the exclusive property of the shareholders. Whether the business be profitable or not for the debenture holders, the shareholders, under the terms of the charter, are entitled to

this ten per cent. After paying the expenses of operation out of this fund the balance is divided among the shareholders as dividends. The expense of operation, however, does not include the commission of agents for selling debentures. The first payment of Two Dollars made upon a debenture is given to the agent as his commission. All the charters provide that agents' commissions shall be paid out of the Reserve Fund.

Let us now examine the result of the operations of the New Orleans Debenture Company. This company had been in existence for a period of fifty-three months at the date of trial.

This company issued 27,908 debentures and received from the holders of these debentures the sum of $843,642. Of this sum $55,816 was paid to solicitors as their commissions; 9332 debentures were redeemed by paying the holders 50 per cent. profit on the amount received by the company from them, and the sum of $491,778 was used in these redemptions; 1759 debenture holders were not able to keep up their payments after their bonds were seven months old, and received from the company 50 per cent. of the amount paid in by them, and the sum of $22,103.89 was used in paying these debenture holders the "surrender" value of these debenture bonds. Salaries and other expenses amounted to $64,382.79. The total expenditures of this company amounted to $606,227.93. The Reserve Fund at the present time amounts to $199,268.94. The outstanding valid bonds of this company at the present date number 10,582, and their holders have paid to the company the sum of $439,584, or more than twice the amount now standing in the reserve fund as a guarantee of the payment of these bonds.

Strange to say, the company has no means of investing this money in any better method or in any better securities than

those generally dealt in by corporations that have a surplus. The reserve fund is used by the company for two purposes: First, to make loans to debenture holders, and, second, to buy and deal in stocks and bonds on the open market. The New Orleans Debenture Company has $62,343.59 invested in stocks and bonds, and has made loans upon debentures amounting to $82,662.23. It has loaned the stockholders money upon their individual notes, secured by the company's stock, and these loans now amount to $25,655.38.

The result of the operations of this company for a period of fifty-three months has been a loss of $209,033.84, as will be seen by the following loss and gain account, which is conceded by the Secretary of the company to be correct:

EXHIBIT "A."

LOSS AND GAIN ACCOUNT JANUARY 20, 1899.

Losses—			
Agents' commission on 7912 debentures @ $2.00		$15,824 00	
Agents' commission on 19,996 debentures @ $2.00		39,992 00	
Fifty per cent. profit to 9332 debenture holders		163,926 00	
Salaries, general expenses, etc., from expense fund		64,383 79	
Royalty to Dr. Waiss		3,957 80	
Dividends to stockholders as follows:			
5 per cent. April 1, 1897	$2,500 00		
10 per cent. October 1, 1897	5,000 00		
5 per cent. January 1, 1898	2,500 00		
5 per cent. April 1, 1898	2,500 00		
5 per cent. July 1, 1898	2,500 00		
5 per cent. October 1, 1898	2,500 00		
5 per cent January 1, 1899	2,500 00		
		$20,000 00	
			$308,083 59
Gains—			
From Fines		$2,083 00	
From Interest, Reserve Fund	$20,957 09		
Less Renewal Interest	4,004 45	16,952 64	
From 1759 surrendered debentures		22,103 89	
From 6235 lapsed and suspended debentures		13,188 22	
Initiation fee on 19,996 debentures at $2.00		39,992 00	
From Capital Investment Ac		4,730 00	
Total gains			99,049 75
Net loss			$209,033 84
Assets to date		$259,386 16	
Amount received from 10,582 debenture holders, who paid	$439,584 00		
Less initiation fee	21,164 00		
Net amount Company received from these debentures in force	$418,420 00		
Capital paid in	50,000 00		
		468,420 00	
Deficit		$209,033 84	

The bonds outstanding are, of course, of different ages. The oldest bond was, at the time of the trial of this case, twenty-eight months old. The holders of 1759 debentures were unable to continue their payments and lost, on account of their inability to keep up their payments, the sum of $22,103.89. The holders of 6235 debentures allowed same to lapse and received nothing from the company. These, in brief, are some of the facts shown by the voluminous transcript of the case of the State vs. the New Orleans Debenture Redemption Company. The entire facts and figures have been carefully tabulated by August M. Benedic, expert accountant, and the Court will find the tabulation as an addendum to this brief. We deem it proper to state that these calculations and tabulations were made by Mr. Benedic, as an expert, before his appointment as liquidator, and before he had any idea of being appointed.

In discussing the question as to whether this business could be incorporated under the laws of Louisiana we presented the following argument in our brief filed with the State Supreme Court:

By what warrant of law do the plaintiffs in error pretend to be a corporation? Their answer is that they are a legal, valid corporation and are entitled to exercise franchises as such, under and by virtue of Act No. 36 of 1888, known as the Limited Liability Act. They point to this act as their statutory warrant. Let us then examine the provisions of this act. Its title reads as follows:

"An act to provide for the formation of corporations for certain purposes, limiting the capital of the same, and the liability of the stockholders thereof."

We ask the Court to particularly notice that corporations are to be formed, under this act, for certain purposes and that

the capital of the same is to be limited. Section 1 of the act reads as follows:

"That it shall be lawful for any number of persons, not less than three, upon complying with the provisions of the laws of this State governing corporations in general, to form themselves into and constitute a corporation for the purpose of carrying on any lawful business or enterprise, not otherwise specially provided for, and not inconsistent with the constitution and laws of this State; provided that no such corporation shall engage in stock jobbing business of any kind; the corporations herein provided for to have a capital stock of not less than five thousand dollars."

It is manifestly the object of this law that no corporation shall be organized for any business or enterprise that is not lawful. And furthermore that the business must not be inconsistent with the Constitution and laws of this State.

Even were the statutes silent upon this question, the courts would have the power to pass upon the legality of any business which its promoters might attempt to pursue under the color of a corporate franchise.

The Am. & Eng. Ency. of Law, Vol. 7, page 648, lays down the following doctrine:

"Incorporation will not be granted under the general laws for a purpose which is regarded by the courts as being against public policy." See **Mutual Aid Assn., 15 Philadelphia, 626.** *In Re* **Helping Hand Marriage Assn., 16 Philadelphia, 644.**

The corporation laws of this State contained in the Revised Statutes (Sec. 683), provide that corporations may be formed for certain specified objects and "generally all works of public utility and advantage."

It is therefore clear that the objects and purposes of a valid and legal corporation must be consistent with the laws of the State, and not contrary to public utility and advantage.

Corporations organized in restraint of trade have been compelled to forfeit their charters because their objects were contrary to public policy.

In other words, the general statutes of this State were enacted for incorporations of business and enterprises that will be beneficial to the body politic, and the courts have the power to decide whether or not any particular corporation is organized for a purpose inconsistent with public policy and prejudicial to the interests of its citizens.

The courts of Louisiana have the power to forfeit the charter of any corporation whose objects and purposes are not of "public utility and advantage," and hence, inconsistent with the laws and Constitution of this State.

What then is the business of the Debenture Company?

Their only business is the making of debenture contracts; the business of borrowing money by issuing debentures.

The nature of a debenture has already been set forth. It does not come within the meaning of a debenture as described in the Am. & Eng. Ency. of Law (Second Ed., Vol. 7, 962.) A debenture, as the term is understood in England, and generally in the common law States, is an instrument acknowledging a debt, and promising to pay the same at a specified time, generally secured by a common law pledge or chattel mortgage or an equitable lien upon the personal property of the company issuing it. It is true that sometimes the debenture is not secured in this way, but in all cases it is an acknowledgment of the debt due by the company and a promise to pay the same at some future date, which is fixed and determined. It differs radically from the contract which the plaintiffs denominate a debenture, or debenture bond. It

has no clause of forfeiture therein and a consideration for the bond is paid in advance. It guarantees the holder no illegal rate of interest and, in fact, is nothing more nor less than a promissory note of the company.

The debenture bond issued by the plaintiffs purports to be a contract by which the debenture holder binds himself to pay two dollars a month for seventy-two consecutive months and agrees to forfeit his money in whole or in part, if, for any reason, he fails to make any monthly payment. The debenture company binds itself to pay the debenture holder fifty per cent. profit on whatever he pays to the company, but reserves the right to put an end to the contract whenever it chooses. The making of these contracts by which the company borrows money, constitutes its "business," unless it be contended that the investment of the reserve fund, amounting to twenty-five per cent. of the sum paid in, is a "business."

Is this contract favored by the law? Is it a legal contract? Is the "business" of making these contracts a legal business? These are the questions that confront the Court and are the main questions in the case.

A contract is illegal when it is without a cause, or when it has an unlawful cause. (C. C. 1893.)

A cause is unlawful when it is forbidden by law, or when it is *contra bonos mores*. (C. C. 1895.)

By the *cause* of a contract is meant the consideration or motive for making it. (C. C. 1896.)

What is the cause or motive for making debenture bonds? On the part of the company it is, undoubtedly, the hope of making a profit by forfeiting the rights of the debenture holders, owing to their inability to keep up their contracts. If this is not the motive or the cause actuating the promoters of the company in making the contracts, what is the motive?

Is it the desire to obtain money for investment? This can scarcely be, for the company, immediately upon receiving the money, distributes 65 per cent. of it to its debenture holders.

Only 25 per cent. of the money received from the debenture holders is kept for investment, and the motive for making the contracts can not possibly be considered to be the acquisition of a fund equal to only 25 per cent. of the obligations assumed by the company in acquiring it. Therefore, we repeat that the motive or cause, so far as the company is concerned, for making the contract is the hope of making gain by forfeiting the rights of the debenture holders. A contract having forfeiture for its sole purpose is undoubtedly an illegal contract. It is true that a forfeiture clause is contained in a great variety of contracts (and counsel for defendants tells us that it is a stipulation of every life insurance contract); but there is a great distinction and difference between contracts which have a forfeiture feature in them as their only motive and object and contracts which have a forfeiture clause for the purpose of compelling the carrying out of a contract. Where a contract has a legal object or motive and the clause of forfeiture is merely an ancillary provision, the courts will recognize the rights of the parties to stipulate a penalty and pronounce the contract legal. Where, however, the forfeiture clause is not an ancillary clause, but the main object and purpose of the contract, we can not believe that the courts will pronounce the contract a legal and binding one.

If two persons were to contract with each other and bind themselves to deposit, on the first of every month, one hundred dollars in a bank, and should either of them fail to appear upon the day stipulated and make his deposit, the other should receive the entire fund, the contract would be an illegal one. The motive and object for making it, on

each side, would be the hope that the other party would not appear and thus forfeit his rights. The motive would not be legal, and the contract would partake of the nature of a wager between the parties to it. Forfeiture would not be an ancillary stipulation to the contract, but would be its main feature, its controlling object.

In what way would such a contract differ from the debenture contract? Not very much, because, so far as the debenture company is concerned, their motive is forfeiture.

The second ground of illegality of a debenture contract is that it stipulates to pay the debenture holder an illegal interest for the use of his money. The company obligates itself to pay the debenture holder 50 per cent. profit upon the money he has paid in to the company in a period of not less than seven months and not more than seventy-two months. If the company redeems its bond when it is seven months old, the holder thereof will have paid fourteen dollars to the company and he will receive the sum of twenty-one dollars. The company will have had the use of the money for an average of about three and a half months. It, therefore, pays 171 per cent. simple interest. If the debenture bond runs until it becomes six years old, the holder thereof will have paid to the company $144.00 in monthly installments of two dollars each and will receive from the company $216.00. The company will have had the use of the money for an average of thirty-six months and, therefore, in redeeming the bonds it pays a profit equal to 13 per cent. compound interest per annum upon the money borrowed. The holder of the debenture bond merely lends his money to the company. He is conceded to be a creditor. He receives profits—the civil fruits of money, which is interest.

The law of Louisiana stipulates that the highest interest that can be stipulated in a contract is eight per cent., and we maintain that a contract, which stipulates a profit in the nature of interest which is greater than eight per cent., is an illegal contract. A corporation can not be organized under the general laws of the State for the express purpose of issuing illegal contracts.

The third ground of the illegality of the debenture contract is that its duration is, in a great measure, within the control of the debenture company. It is a contract at the will of one party. The debenture company has control of the redemption of bonds. On a particular day, it may or may not elect to use the entire redemption fund for the purpose of redeeming bonds. It may decide to use only one-half of the redemption fund for the purpose of redeeming bonds on a particular date and reserve the balance for future redemptions. In other words, the Board of Directors of the debenture company have some discretion in the matter; the debenture holder has no discretion, or control, or voice. He must continue his payments until the company redeems his bonds, as, otherwise, he forfeits the money paid in by him. Such is the nature of the debenture contract, and the State maintains that the making of such contracts does not constitute a business consistent with the laws and constitution of this State.

The learned counsel for plaintiffs in error cited the case of the Union Investment Co. vs. Lutz et als., decided by one of the judges of the Appellate Court for the First District of Illinois. Your attention is called to the fact that the decision was not rendered by a court of last resort.

The court holds that the scheme "applies the principle of joint tenancy to the investments by the subscribers, the survivorship depending upon default instead of death." If this be true then the scheme is inconsistent with the laws of

Louisiana, however consistent it may be with the common law. The law of Louisiana does not recognize the principle of joint tenancy; it is repugnant to the civil law, it is inconsistent with it. In order that the court may appreciate the weakness of the opinion in the case of the Union Investment Assn. vs. Lutz, we ask that your Honors read it in full. **(50 Newell, 176).**

The cases of State vs. Corkins and State vs. Talbert, 27 S. W. Rep. 363 *et seq.*, are also cited by the defendants. The case of State vs. Corkins is clearly inapplicable, as the question as to whether or not the business was unlawful was not raised in the information.

"As will be seen," says the court, "there is no charge in the information that respondents or the corporation they claim to manage is doing an unlawful business, and for the purposes of the question as presented by the demurrer we must assume that they are doing a business authorized by law."

In State vs. Talbert the court says: "The information contains the same charges as are made against the respondent in the case of State vs. Corkins." We, therefore, conclude that the legality of the business was not put at issue by the information filed by the Attorney General.

Furthermore, there was an act passed by the Legislature of the State of Missouri, recognizing the legality of bond investment companies, and, therefore, the entire question was whether the defendant company came within the purview of that statute.

The court did say that there is nothing illegal in the issuance of bonds nor selling the same upon installments IN A LAWFUL MANNER. The entire case was decided upon demurrer and there was no evidence taken as to the character of business conducted by the company.

In support of our position that the business of defendant companies is deceptive and fraudulent, we cite: **McLaughlin vs. National Mutual Bond & Investment Co., 64 Fed. Rep., 908. In Re National Indemnity and Endowment Co., 21 Atlantic, 872; (142 Pa. 450); United States vs. McDonald, 59 Fed. Rep. 563.**

In the first of these cases the Court says:

"Its inherent vice is substantially the same as was pointed out with respect to a similar concern in the case of the National Endowment Co., 142 Pa. St. 450; 21 Atl. 879, and of which the Supreme Court of Pennsylvania said:

"It manifestly belongs to that class of associations by far too numerous, the practical effect of whose operations is to enrich a few at the expense of confiding and ignorant people. Such corporations are 'unlawful and injurious to the community.'

"It is evident that the attractiveness of the present project is due to the opportunity which it affords for acquiring money by chance, and not as the reward of industry, frugality or sagacity. The interesting question to those who participate in it is one of fate, and nothing else. It is this: Which of them shall be forced to forfeit, and so 'fall in fortune's strife;' and which of them, surviving that catastrophe, will have obtained redemption of their bonds before the final and inevitable collapse occurs? Upon these contingencies the monthly and quarterly payments are put in jeopardy, and according to the issue of the game, the company, the holder of these stakes, distributes them among the winners. All such schemes are inhibited. They are deceptive and fraudulent, and in their nature simply gambling. **In re National Endowment Co., supra; Brua's Appeal, 55 Pa. St. 294; U. S. vs. McDonald, 59 Fed., 563; Hornor vs. U. S., 147 U. S. 449; 13 Sup. Ct. 409.**"

The Supreme Court of the State of Pennsylvania, **In re National Indemnity & Investment Co.**, rendered the following opinion:

"*Per Curiam.* On Deeember 15, 1890, the court below approved the charter of the appellant company, and decreed that, upon its being properly recorded, the subscribers thereto should be a corporation, etc. Subsequently the Court became convinced that the charter had been improvidently approved, and of its own motion directed a rule to be entered upon appellant to show cause why it should not be revoked. The matter wss then referred to an auditor who reported, *inter alia*, 'that the purposes and objects of the National Indemnity & Endowment Company do not come within the first class of corporations, according to the provisions of the act of assembly of April 29, 1874, nor any of its supplements;' and that the learned judge 'who granted the certificate erred in certifying the purposes of said corporation were lawful, and not injurious to the community.' The Court thereupon vacated its order of approval, and this appeal was taken by the company from said order. The appellant company claims to be a beneficial association, within the meaning of the ninth paragraph of Section 2 of the Act of 1874. Without going into detail, the auditor and the court bolow have sufficiently demonstrated that the only persons likely to be benefited by the scheme set forth in the charter are the officers themselves. It manifestly belongs to that class of associations, by far too numerous, the practical effect of whose operations is to enrich a few at the expense of confiding and ignorant people. Such corporations are 'unlawful and injurious to the community,' and in this age of deception and fraud too much care can not be exercised in scrutinizing the provisions of charters with sounding names and alluring schemes to benefit the public. We are in no doubt of the power of the Court to

revoke this alleged charter. It never was a charter. It was not authorized by any act of assembly, and is absolutely void. Had it been authorized by the Act of 1874, it could only be reached by a *quo warranto*. But a void charter confers no rights, and the court below was justified in revoking the order which gave it an apparent validity."

Judge Grosscup, of the United States District Court for the Northern District of Illinois, used the following language in connection with the scheme that came under his judicial observation in the case of United States vs. McDonald.

"Now, does this constitute a lottery? There is no doubt, gentlemen, upon the face of it, that it constitutes a cheat. The testimony shows that this company has been in existence now for two years, and has had 50,023 applications. According to the constitution of its organization, it has, therefore, received more than half a million dollars from the $10 preliminary fee. The testimony shows that it has paid out out $206,000 from so-called trust fund. If it had paid out all it received, as the constitution of the company required it to do, then it has received, as maintenance from the dues, more than $40,000. Therefore, after an experience of two years, the officers and stockholders have received more than $500,000, and its so-called beneficiaries have received but $206,000. That is plunder of the public. It is said that this has been done fairly. The Court, of course, is not sitting here to pass upon the fairness of any such transaction. Two hundred years ago, when coaches were robbed by highwaymen on the heaths of London, it was always said that the highwaymen acted with courtesy, but nobody but an ignorant fool returned to London without knowing he had been plundered. But that does not prove that it is a lottery. It may be a cheat, but we must ascertain by the legal canons and definitions whether it is a lottery."

The evidence adduced showing the present financial condition of the Debenture Company is, however, the strongest argument against the legality of the scheme, and a consideration of this evidence will convince the Court that the scheme is **deceptive and fraudulent.**

The New Orleans Debenture Redemption Company has lost by operation of this magnificent scheme the sum of $209,033.84. It has paid out to the holders of redeemed debentures, as a profit to them, the sum of $164,000 in round numbers. During the same period it earned but $22,000 by forfeiting the rights of debenture holders whose bonds were more than seven months old, and but $3,000 by forfeiting the rights of those debenture holders whose bonds had not attained that age, and but about $16,000 in interest. The secretary of this company admits that the scheme has made a loss. Whose loss has it been? The stockholders have made a profit of 40 per cent. by declarations of dividends on the $50,000 subscribed, or 200 per cent. on the amount actually paid in! Those debenture holders whose bonds were drawn have made a profit of $164,000. Out of whose pockets does this profit come if the company has not earned a profit? Manifestly out of the pockets of those debenture holders whose bonds have not been redeemed.

We are told, however, that if a company keeps on running in the same manner and does the same business it has done in the past, that at the end of thirty years it will be financially strong. The contention of the State is that if the New Orleans Debenture Redemption Company should continue for several years longer it would bring financial ruin to all persons that may hold unredeemed debentures.

The company was at date of trial 53 months old, and the age of its oldest debenture was twenty-eight months. When the company was seven months old, its oldest unre-

deemed debenture was seven months old. Therefore, in spite of the redemption of the lowest numbers, the age of the outstanding debentures has steadily increased. The ratio of the age of the company to that of the outstanding debentures at the time of the trial, was as 53: 28. Subtract the constant 7 from each side of the ratio and we would have a true ratio, namely, 46: 21. Therefore, the problem to be solved is a very simple one. If the business of the New Orleans Company continues in the future to be exactly as it has been in the past, when will the age of the oldest outstanding debenture become 72 months old? 46: 21 :: X: 72. This gives us, as the answer to the problem, 158 months, or a little over 13 years.

We conclude, therefore, that even though the business of the New Orleans increased in the same arithmetical proportion as it increased in the past, the company will be compelled to resort to its reserve fund in order to meet matured debentures when it has arrived at the age of thirteen years.

The secretary of the company testifies that he has calculated that the company would reach the age of thirty years before it would be necessary to touch the reserve fund. He bases these calculations upon two assumptions, to wit: that the company will earn 6 per cent. compound interest upon its reserve fund, and, second, that the lapses or forfeitures will amount to 2 per cent. per month or about 18 per cent. a year. As the company has made no such interest in the past, there is no ground for the first assumption.

The absurdity of the last assumption, when viewed in the light of the past experience of the New Orleans Debenture Company, is great. During its existence the New Orleans Company has collected over $800,000; the total amount of all bonds which have been forfeited is, in round numbers, $65,000.

Therefore, during 53 months the entire forfeitures have not amounted to 10 per cent. These are facts shown by the record and yet the secretary, whom we are told is an actuary, in calculating the feasibility of the scheme, assumes that the lapses will amount to 18 per cent. per annum. His calculations, of course, are worthless from a mathematical standpoint. It is suprising that, as a mathematician, he should have attempted to demonstrate the feasibility of the scheme without determining the exact lapse ratio.

We might call the Court's attention to the further fact that the lapse ratio is a variable one. When the bond is but a few months old it is more liable to lapse than when it is of a greater age. When the bond arrives at the age of four years the holder thereof can borrow enough money from the company to keep it in force until its maturity. We would, therefore, expect to find that no bond of the age of four years would be lapsed or forfeited, and yet the secretary of the company has based his calculation upon a lapse ratio of 18 per cent. upon all bonds indiscriminately.

The evidence demonstrates that the scheme is not feasible, that it is bound to fail, and, therefore, that it is deceptive in its character. A scheme deceptive in its character can not be operated by a corporation organized under Act 36 of 1888—that act was never intended as a statutory warrant for such "an enterprise."

Viewing the business from the standpoint of the twenty-three stockholders, the other plaintiffs in error here, we find that they are claiming that the Debenture business carried on by the New Orleans Debenture Redemption Company of Louisiana is their own private business and their own private avocation. We say that no matter what the intrinsic character of the Deben-

ture business may be, this business was obtained and carried on under pretenses which were misleading and representations such as have been denounced as fraudulent by this tribunal. The liberty to pursue a lawful avocation as set forth in the assignments of error No. 13 can not possibly refer to the right of a corporation to a franchise to do a particular business, for the obvious reason that a franchise is not a liberty belonging to individuals. We must, therefore, infer that the individual stockholders appearing as plaintiffs in error, believe that if it be held that the Debenture Company is not a corporation or that its charter must be forfeited for misuser, they have a right to continue the business as their private lawful avocation. Considered as a private business, it is unlawful because it was obtained and carried on under the pretense that the company was incorporated under the laws of the State of Louisiana. Under this pretense the Debenture holders were induced to do business with the plaintiffs in error and if this pretense be false, then the business can in no way be considered the lawful individual business of the stockholders. But not only did tne plaintiffs in error pretend that they were a corportion in law, but they represented to the public in numerous circulars issued, and in all the statements made, that their capital stock of $50,000 was fully paid up. In the statement of facts we have shown the method that the Debenture Company and its stockholders pursued in giving color to this representation.

On the same day that most of the stockholders gave checks for the amount of their assumption the company gave its check to them on a "loan."

A similar transaction was passed upon by this Court in the case of Sawyer vs. Hoag, Assignee, 17 Wall. 610, where the following language was used:

"We do not believe we characterize it too strongly when we say that it was a fraud upon the public who were expected to deal with them.

"The result of it was that the capital stock of the company was neither paid up in actual money, nor did it exist in the form of installments properly secured."

Therefore, we repeat that the debenture holders were induced to loan money to this Company under pretenses which were deceptive, and the business can not be considered in any sense of the word the private, lawful business of its stockholders as individuals.

The only argument adduced in the brief of plaintiffs in error in support of the legality of this scheme is that Act No. 171 of 1898, of the General Assembly, imposes a license tax on the business carried on by a debenture redemption company or loan and investment company. The plaintiffs do not claim that they paid a license under the provisions of said act, but profess to believe, nevertheless, that the mere mention of debenture redemption companies therein legalizes their particular and peculiar scheme. It could be claimed with equal force that the license act legalizes the business and schemes of such loan and investment companies, which promise their investors 5 per cent. per month interest, and were called by the newspapers "Get-rich-quick" companies. If such is the effect of the act, the promoters of such loan and investment companies, some of whom recently came to grief in New York City, should hie themselves to Louisiana, where they would enjoy immunity from arrest.

But the statute furnishes no rule by which the legality of any business can be ascertained, nor is the tax-collector invested with power to determine whether the business of a corporation which offers to pay a license tax is lawful and its charter valid.

Such questions must be decided by the judicial department of the government and each case must be judged upon the evidence adduced. We may admit that all loan and investment companies do not carry on illegal businesses, and all debenture companies are not based upon the same vicious principle; but this would be far from admitting that the business carried on by the New Orleans Debenture Redemption Company, Limited, was not deceptive and fraudulent. Those companies which are legal and authorized to do business in the State of Louisiana should pay the license tax; those companies which are illegal, should be suppressed.

The Supreme Court of Louisiana has decided that the plaintiff company belongs to the latter class.

A motion to dismiss has been filed by the defendant in error through undersigned counsel which will be found as an appendix to this brief. The grounds upon which the motion is based have been already covered. We believe this Court is without jurisdiction of this cause and the motion should be allowed.

Should your Honors differ with us, we respectfully ask that the decree of the Supreme Court of the State of Louisiana be affirmed.

Respectfully submitted,

WALTER GUION,

Attorney General.

MILTON J. CUNNINGHAM,

FRANK E. RAINOLD,

Of Counsel for the State of Louisiana, Defendant in Error.

APPENDIX.

(17,505.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 129.

THE NEW ORLEANS DEBENTURE REDEMPTION COMPANY OF LOUISIANA, LIMITED, ET AL., PLAINTIFFS IN ERROR,

versus

THE STATE OF LOUISIANA.

In Error to the Supreme Court of the State of Louisiana.

And now comes the State of Louisiana, defendant in error, herein, by Walter Guion, Attorney General for the State of Louisiana, and by Milton J. Cunningham and Frank E. Rainold, who appear as counsel in her behalf, and moves the Court to dismiss the writ of error in the above cause for want of jurisdiction, because the judgment or decree from which the said writ of error purports to have been taken is the judgment or decree of the Supreme Court of one of the United States, to-wit: Supreme Court of the State of Louisiana.

2. Because said judgment remanded said cause for further proceedings in the lower court, and the judgment was and is therefore not a final one.

After the Supreme Court had rendered judgment in this cause, applications for a rehearing were made by all parties. The Court, in passing on these applications, amended the judgment so as to remand the cause to the lower court for the purpose of determining whether the liquidation of the corporation should be through a receiver to be appointed by the Court, through a liquidator to be appointed by the Governor of the State, or whether the defendants themselves should have the right to liquidate its own affairs. The cause has, therefore, not been determined by a final judgment.

3. Because by said judgment no decision was made upon a federal question which had been raised by the plaintiffs in error. The plaintiffs in error claim that there was not due process of law inasmuch as the citation was addressed to the New Orleans Debenture Redemption Company of Louisiana, Limited, through its proper officers, and took the position, that citation should have been addressed to each and every owner of a share of stock in the corporation.

This is a suit to oust the corporation from the exercise of its franchise, and the manner and form of citation, in such a case, is provided by statute of the State of Louisiana. This statute provides that citation should be addressed to the defendant, as in ordinary cases, and that service should be made as in ordinary cases. The Supreme Court held that citation had issued properly and had been served in accordance with the terms of the statute as well as with the provisions of the charter of plaintiffs in error. Nowhere in the pleadings was the constitutionality of this statute raised by the plaintiffs in error, and hence there is no federal ques-

tion involved in this cause. There has been no taking of property without due process of law, because the judgment of the Supreme Court is not final as to the disposition of the assets of plaintiffs in error. The whole question was remanded to the lower court and left an open one as to whether the parties in interest should be allowed to liquidate their own affairs, or whether the assets should be distributed under the supervision of the court. Until the lower court shall have appointed a receiver, or confirmed a liquidator, there can be no taking of property either with or without due process of law. The issuance of an injunction, which restrained the corporation, its officers, agents and employees from disposing of the property during the continuance of the suit, and from carrying on business as a corporation until its right so to do had been determined by final judgment, does not involve a federal question.

4. Because the judgment rendered by the Supreme Court was given on grounds which Section 709 of the Revised Statutes of the United States does not make cause for error. In its opinion, the State Supreme Court not only decided that the citation issued in accordance with the terms of the Statute of the State, but likewise found the following facts:

That all the persons connected with the Association as stockholders had appointed the President as the proper person upon whom citation might be served in any suit that might be brought against them.

By this convention they likewise agreed that they could be sued in the name of the New Orleans Debenture Redemption Company of Louisiana, Limited; hence the parties were bound by their agreement, and since citation had issued to them in the manner and form as they agreed it should issue, and was served upon the officers designated by them, they had no ground for complaint. As the decision of the State

Supreme Court could stand upon these grounds alone this case furnishes no cause for error.

Wherefore mover prays that this motion to dismiss be granted and the writ of error dismissed for want of jurisdiction; but should said motion be not allowed for the reasons set forth, that the judgment of the Supreme Court of Louisiana be finally affirmed with costs, and mover prays for such other and necessary relief which the nature of the case may require.

ABSTRACT, SHOWING CONDITION OF THE NEW ORLEANS DEBENTURE REDEMPTION COMPANY OF LOUISIANA. LIMITED.

ASSETS AND LIABILITIES JANUARY 20, 1899.

ASSETS—			
5,000 U. S. 4's at 112⅞	$5,643 75		
12,000 City Premium Bonds at 216-91	26,027 40		
2,500 St. Charles R. R. Stock at 53½	2,675 00		
4,500 Orleans R. R. Gold Bonds, 107-11	4,830 00		
10,000 City and Lake R. R. Bonds, 107-30	10,730 00		
2,000 Lafourche Levee Bonds, 110	2,200 00		
1,000 M. L. & T. R. R. Bonds, 124	1,240 00		
4,200 Germania National Bank Bonds, at 90	3,780 00		
5,000 Drainage Bonds, at 103	5,150 00		
Brokerage Balance	67 44—		$62,343 59
Loans Secured by Securities	4,175 00		
Loans Secured by Commercial Paper	2,027 94		
Loans Secured by Company's Stock	25,655 38		
Loans Secured by Mortgage Paper	16,347 00—		48,205 32
Loans Secured by Debentures			82,662 23
Office Fixtures			999 47
Cash in Banks			36,724 04
Suspense Account—			
Royalty Bought from Dr. W. Estate	6,470 00		
A. Himel, Advanced as Guarantee	962 80		
A. Himel, Advanced as Traveling Expense	1,471 65		
Other Traveling Men, Traveling Expense	3,289 49		
E. L. Garland, Expense Incurred to Foreclose Mortgage	368 27		
L. P. Bryant, Expense Account Negotiating Loan	1,150 00		
H. L. Garland, Mortgage Loan $800 00			
H. L. Garland, 2 years' Interest 160 00—	960 00		
Deposit American National Bank, about	8,000 00		
Two Judgments	2,500 00		
Open Accounts, 3	150 70		
State Treasurer of Texas	1,080 20		
Other Items not Stated in Testimony	3,485 65—		$29,888 76
Total Assets			$260,823 41
LIABILITIES.			
Advance Payments from Debenture Holders	1,056 00		
Open Accounts	381 25—		$1,437 25
Net Assets			$259,386 16

EXHIBIT A.

LOSS AND GAIN ACCOUNT, JANUARY 20, 1899.

LOSSES—			
Agents' Commiss on on 7,912 Debentures, at $2		$ 15,824 00	
Agents' Commission on 19,996 Debentures, at $2		39,992 00	
50 per cent. profit to 9,332 Debenture Holders		163,926 00	
Salaries, General Expense, etc., from Exp. Fund		64,383 79	
Royalty to Dr. Waiss		3,957 80	
Dividends to stockolders as follows:			
5 per cent., April 1, 1897	$2,500 00		
10 per cent., October 1, 1897	5,000 00		
5 per cent., January 1, 1898	2,500 00		
5 per cent., April 1, 1898	2,500 00		
5 per cent., July 1, 1898	2 500 00		
5 per cent., January 1, 1899	2 500 00—	$20,000 00—	$308,083 59
GAINS—			
From Fines		$2,083 00	
From Interest, Reserve Fund	$20,957 09		
Less Renewal Interest	4,004 45—	16,952 64	
From 1759 Surrendered Debentures		22,103 89	
From 6235 Lapsed and Suspended Debentures		13,188 22	
Initiation Fee on 19,996 Debentures, at $2		39,992 00	
From Capital Investment Account		4,730 00	
Total Gains			$99,049 74
Net Loss			$209,038 84
Assets to date		$259,386 16	
Amount Received from 10,582 Debenture Holders, who paid	$439,584 00		
Less Initiation Fee	21,164 00		
Net amount Company received from these Debentures in force	$418,420 00		
Capital paid in	50,000 00—	$468,420 00	
Deficit		$209,033 84	

EXHIBIT A.

RECEIPTS AND DISBURSEMENTS, JANUARY 20, 1899.

RECEIPTS—			
Total receipts by the Company and agents on 27,908 debentures issued		$843,642 00	
Deduct for agents' commission:			
On 7,912 debentures	$15,824 00		
On 19,996 debentures	39,992 00—	55,816 00—	$787,826 00
Amount received by fines			2,083 00
Amount received by interest			20,957 09
Amount received from Capital Investment			1,030 00
Amount received from sale of Consols			3,700 00
Amount received on Capital Stock:			
5 per cent. call, Oct. 1, 1894, on $50,000 00		2,500 00	
5 per cent. call, Nov. 1, 1894, on $50,000 00		2,500 00	
5 per cent. dividend, April 1, 1897, on $50,000 00		2,500 00	
85 per cent. call, April 1, 1897, on $50,000 00		42,500 00—	50,000 00
Total receipts by the Company			$865,596 09

DISBURSEMENTS—

Paid 1,759 debenture holders, surrender value	22,103 89	
Paid 9,332 debenture holders, redemption value	491,778 00	
Paid salaries, etc , from expense fund	64,383 79	
Paid royalty to Dr. Waiss	3,957 80	
Paid renewal interest	4,004 45	
Paid dividends, from expense fund	15,270 00	
Paid dividends, from capital investment	4,730 00	
Total disbursements		$606,227 93
Net receipts		$259,368 16
Credit of reserve fund	$199,268 94	
Credit of redemption fund	8,503 71	
Credit of expense fund	1,613 61	
Credit of advance payment fund	1,056 00	
Credit of open account	381 25—$210,823 51	
Credit of capital stock	50,000 00	
	$260,823 51	
Deficit		$ 1,455 35
		$260,823 51

The diserepancy between this amount	$259,368 16	
And the net assets of	259,386 16	
	$ 18 00	